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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

RUSSELL LEE GOOCH,

Defendant and Appellant.

2d Crim. No. B209105
(Super. Ct. No. 1218467)
(Santa Barbara County)

Russell Lee Gooch appeals from the judgment entered following his conviction by a jury on one count of stalking with a protective order in effect (Count 1 - Pen. Code, § 646.9, subd. (b)),¹ two counts of attempting to dissuade a witness from reporting a crime (counts 2 and 3 - § 136.1, subd. (b)), and one count of violating a protective order by an act involving a threat of violence. (Count 6 - § 166, subd. (c)(4).) The convictions occurred at appellant's second trial; at the first trial the jury deadlocked on all counts and a mistrial was declared. The trial court sentenced appellant to prison for six years, suspended execution of the sentence, and granted probation on various terms and conditions.

Appellant contends: (1) the trial court erroneously determined that, on counts 3 and 6, venue was proper in Santa Barbara County; and (2) the prosecutor committed prejudicial misconduct. We reject the first contention. As to the second contention, we

¹ All statutory references are to the Penal Code unless otherwise stated.

conclude that one alleged instance of misconduct is without merit and the other has been forfeited because of a failure to object on misconduct grounds at trial. Accordingly, we affirm.

Facts

Appellant and the victim, Stacy Ann Bruneau, married in October 2003. They both worked as registered nurses. In January 2004, when they were living in Belle Chasse, Louisiana, appellant assaulted Bruneau. Appellant was arrested, and the couple separated.

In August 2004 Bruneau moved to California and began working in San Rafael. The following month, appellant moved into Bruneau's apartment. In November 2004 appellant threw a phone book and a beer can at Bruneau. Appellant was arrested and pleaded guilty to battery on March 3, 2005. A protective order was issued requiring appellant not to contact Bruneau and not to come within 150 yards of her.

On March 23, 2005, Bruneau returned to her apartment after work and found appellant hiding in the closet. Appellant threatened Bruneau and left. Later that same day, appellant forcibly entered Bruneau's apartment and confronted her. Bruneau ran to the bathroom, shut the door, and telephoned the police. As a result of this incident, in August 2005 appellant was convicted of two misdemeanors: violating a protective order (§ 166, subd. (c)(1)) and stalking. (§ 646.9, subd. (a).)

In July 2005 Bruneau filed for divorce, and the divorce became final in the spring of 2006. In September 2006 a protective "peaceful contact" order was issued. It allowed appellant to contact Bruneau, but directed him not to annoy, harass, or threaten her or "attempt to or actually prevent or dissuade" her from "making a report to any law enforcement agency or person."

Count 2: Attempting to Dissuade a Witness from Reporting a Crime

Bruneau moved to Santa Barbara. On November 5, 2006, appellant telephoned Bruneau and was "verbally abusive." Bruneau was at her apartment in Santa Barbara and appellant was in San Francisco, where he resided. Bruneau hung up the telephone, but appellant continued to call her. Appellant then sent harassing emails to Bruneau.

Bruneau felt "[a]fraid" and "[t]hreatened." Bruneau emailed appellant that she was going to report him to the district attorney. In reply to her email, appellant left threatening voice mails on her cellular telephone. Bruneau was "terrorized." She "[p]acked [her] things and left [her] apartment" in Santa Barbara because she feared that appellant was coming there to "carry out his threats." Bruneau made a recording of the voice mails. She sent the recording and appellant's emails to law enforcement officials.

The voice mails left by appellant on November 5, 2006, included the following excerpts:² "So you tell fuckin' S-, the D.A. to bring swat and a body bag because that's what they're gonna need to take me out, because you gotta kill me to cuff me." "I'm gonna come see you. . . . Palm Springs is where you're workin' right? . . . Before you get on your plane tomorrow morning, I'll meet you in Palm Springs. Bring me a black SUV for my niggas. We're gonna come see you. So, uh, could you call the D.A., uh, you go right ahead and do that. . . . So, um, you go ahead and make that call to the D.A. okay, because you'll never put me in jail again." " . . . I'm comin' at you civilly. I'm gonna sue your fuckin' ass. I'm gonna sue your kids. . . . All the money they're gonna make for the rest of their fuckin' life and the rest of your life. . . . You try to get me put in jail. Okay, I got no problem with that. I called my niggas. You wanna make a threat? I ain't makin' a threat. I'm makin' a promise." "I'm on my way to, uh, Santa Barbara. . . . If I miss you . . . I'll see you in, uh, Palm Springs. So, uh, next time you wanna threaten me on-line, make sure, uh, you can back it up."

Count 3: Attempting to Dissuade a Witness from Reporting a Crime

On November 17, 2006, while at a conference in Dallas, Texas, Bruneau received harassing and threatening voice mails and text messages from appellant. One text

² All voice mail excerpts quoted in this opinion are taken verbatim from People's Exhibit No. 10, a transcript of the voice mails. People's Exhibit No. 10 was not admitted in evidence. A compact disc (CD) of the voice mails was played for the jury and admitted in evidence as People's Exhibit No. 10-A. Before the CD was played, each juror received a copy of People's Exhibit No. 10. The trial court instructed the jurors to use the transcript as "a road map or a guide to help you listen."

message said: "Am pursuing any and all civil and criminal claims against you." Another text message said: "Are you really that stupid? The benefit of the doubt ran out."

The voice mails left by appellant on November 17, 2006, included the following excerpts: "[J]ust brought civil litigation against you. This is nothing but, um, retaliation, um, me suing you" "Maybe I'll be in New Orleans on Monday. . . . I'm just gonna call my niggas and see, you know, if they can drive me down there so I'll be down there. You know, they got lots of money 'cause they're fuckin', you know they're . . . my niggas. . . . That's where you'll be on Thursday[.] That's why I'm in Louisiana We'll come see you, we'll come see you Thursday. How's that?" "Cool, I'll be there . . . with my niggas and seeing if you're there or not . . . I appreciate you callin' . . . the D.A. and probation because they can't do shit 'cause all I did was, uh, threaten to sue you, which I'm threatening you right now to sue your fuckin' ass even more than I was before. So, um, and I'm gonna get you fuckin' arrested and put in jail for perjury"

Count 6: Violating a Protective Order by an Act Involving a Threat of Violence

On January 1, 2007, while in New Orleans, Bruneau received a text message from appellant saying, "Im going to lite u up." During the incident at Bruneau's apartment on March 23, 2005, appellant had declared to her: "I'm going to be the next Scott Peterson. But I'm not going to drown you, I'm going to burn you" ³ In view of this earlier threat, Bruneau considered appellant's text message to be a threat to kill her by burning: "It was like a death sentence." She was "desperate . . . to get someone to help [her] before [she] ended up dead."

Appellant, on the other hand, claimed that his text message had been altered. Appellant testified that the original message had said, "I'm going to light you up in civil litigation." Appellant explained: "It [the message] refers to having the truth come to light, that all [Bruneau's] lies are going to be shined out and truth is going to come clear."

³ Pursuant to Evidence Code sections 452, subdivision (g), and 459, we take judicial notice that on March 16, 2005, exactly one week before the March 23rd incident at Bruneau's apartment, Scott Peterson was sentenced to death for murdering his pregnant wife.

Count 1: Stalking

Count 1, the stalking offense, encompassed the acts that were the basis for the offenses alleged in counts 2, 3, and 6. The stalking offense also encompassed other acts of harassment and intimidation committed by appellant from November 5, 2006, to January 1, 2007.⁴ These other acts included appellant's harassing telephone calls and emails on November 5, 2006, before Bruneau said that she was going to report him to the district attorney. The basis for the offense alleged in count 2 was the threatening voice mails that appellant had left on Bruneau's cellular telephone on November 5, 2006, in an attempt to dissuade her from reporting him to the district attorney. Furthermore, on December 14, 2006, Bruneau received 16 harassing text messages from appellant. On December 30, 2006, while Bruneau was at her mother's house in New Orleans, she received from appellant two voice mails laced with threats and profanities. Appellant was furious because the State of California was trying to revoke his nursing "license due to your [Bruneau's] mouth." Appellant declared: "[I]'ll see you by January sixth, my birthday. If it's in New Orleans or if it's in fuckin' Santa Barbara or it's any place you're gonna be. I'll find you. I'm gonna see you. . . . You're just such fuckin' bull you asked for it, you got it, and I'm gonna give it to you, you fuckin' cunt." Appellant referred to his "niggas" and said, "[W]e're comin' after you all balls, all gas, no fuckin' brakes." (*Id.*, at p. 1088.) Appellant said that he had met his "niggas" in jail. (*Ibid.*)

Venue

Appellant contends that Santa Barbara County was an improper venue for counts 3 and 6. Count 3 (attempting to dissuade a witness) was based on voice mails and text messages that Bruneau had received on her cellular telephone while she was in Dallas. Count 6 (violating a protective order by an act involving a threat of violence) was based on a text message that she had received while she was in New Orleans. The evidence indicates that appellant was in San Francisco when he left the voice mails and sent the

⁴ Count 1 alleges that the stalking occurred "[o]n or between November 5, 2006 and Jan. 1, 2007." In closing argument, the prosecutor told the jury that count 1 "covers everything" during this period.

text messages. Therefore, appellant argues: "The acts which formed the basis of count 3 and count 6 were not committed in the jurisdictional territory of Santa Barbara County." On the other hand, appellant concedes that venue was proper in Santa Barbara County for the count 1 stalking offense because Bruneau was in that county when some of the acts of stalking were committed. He also concedes that venue was proper in Santa Barbara County for count 2 because "[t]he alleged act of intimidation occurred on November 5, 2006, when Ms. Bruneau was in Santa Barbara."

Venue, also referred to as territorial jurisdiction, "is a procedural issue involving the appropriateness of a place for the conduct of a defendant's trial on a criminal charge, and not a substantive issue relating to the defendant's guilt or innocence of the crime charged." (*People v. Posey* (2004) 32 Cal.4th 193, 208, fn. omitted.) "[U]nder section 777 venue lies in the superior court of the county in which the crime was committed, and a defendant may be tried there. [Citations.]" (*Id.*, at p. 199.) The People must prove "the facts of venue only by a preponderance of the evidence [citations]." (*Id.*, at p. 211.) "On review, a trial court's determination of territorial jurisdiction will be upheld as long as there is 'some evidence' to support its holding. [Citations.]" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1117.)⁵

Pursuant to section 781, some evidence supports the trial court's determination that venue in Santa Barbara County was proper for counts 3 and 6. Section 781 provides: "When a public offense is committed in part in one jurisdictional territory and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any competent court within either jurisdictional territory." "Section 781 is construed

⁵ We reject appellant's contention in his reply brief that the "some evidence" standard of review was disapproved in *People v. Posey*, *supra*, 32 Cal.4th 193. In *Posey* our Supreme Court held that venue is a procedural question to be determined by the court prior to trial rather than a question of fact to be determined by the jury at the conclusion of trial. (*Id.*, at pp. 210-215.) The court noted: "[T]he facts bearing on venue are themselves distinct from guilt or innocence, and . . . should be determined by the court before a trial is undertaken in a possibly inappropriate place." (*Id.*, at p. 212.)

'liberally in order to achieve its underlying purpose, which is to expand venue beyond the single county in which a crime may be said to have been committed.' " (*People v. Betts* (2005) 34 Cal.4th 1039, 1057.) " 'We therefore interpret section 781 in a commonsense manner with proper regard for the facts and circumstances of the case rather than technical niceties. [Citation.] [¶] . . . [V]enue is proper in a county where only preliminary arrangements or *acts leading to commission of the crime occur*, even though such acts are not essential elements of the charged offense.' [Citations.]" (*People v. Gutierrez, supra*, 28 Cal.4th at p. 1118, italics added.)

Here, acts leading to the commission of the crimes alleged in Counts 3 and 6 occurred in Santa Barbara County on November 5, 2006. On that date Bruneau was at her Santa Barbara apartment when she received harassing telephone calls and emails from appellant. Bruneau emailed appellant that she was going to report him to the district attorney. In reply to her email, appellant left threatening voice mails on Bruneau's cellular telephone. Bruneau sent appellant's emails and a recording of the voice mails to law enforcement officials.

Appellant was enraged that Bruneau had said she was going to report his communications to law enforcement officials and that she had actually made the report. Appellant's threatening voice mails and text messages on November 17, 2006, and January 1, 2007, were designed to retaliate against Bruneau for making the report and to deter her from taking further action against him. Thus, it is reasonable to conclude that the acts occurring on November 5, 2007, while Bruneau was in Santa Barbara County, triggered the events that resulted in appellant's commission of the offenses alleged in counts 3 and 6.

Misconduct

Allegation that Prosecutor Implied that Bruneau Had Neither Used Profanities Nor Threatened Appellant

At the preliminary hearing Bruneau testified that, in response to appellant's threat against her son, in December 2004 she had left a voice mail for appellant in which she threatened, "I will fuckin' slit you like a pig." At the first trial Bruneau testified that in

2003 she had used profanities in various communications with appellant. (2CT 498-500) At the second trial the court granted the People's motion to exclude Bruneau's profanities and the December 2004 threat.

Appellant contends that the prosecutor committed misconduct during cross-examination of appellant because he "questioned appellant in a manner implying that Ms. Bruneau had never threatened appellant or used vulgar language with him." For example, appellant notes that the prosecutor asked him whether it was "just completely false" that Bruneau had used profanities after he had assaulted her in January 2004 in Belle Chasse, Louisiana. Appellant further states: "The prosecutor then suggested that Ms. Bruneau had *not*, in fact, used such language with appellant because 'after Miss Bruneau was severely beaten by you in Belle Chasse she knew better than to open her mouth and use any type of language like you're describing right now.' . . . The prosecutor challenged appellant to look through a stack of admitted e-mails and messages and find in them an instance in which Ms. Bruneau used vulgar or threatening language toward appellant. . . . Ms. Bruneau's messages to 'slit him like a pig' and her other vulgar messages were not included in this stack because they had been excluded by the trial court."

"[A] prosecutor commits misconduct by asking 'a witness a question that implies a fact harmful to a defendant unless the prosecutor has reasonable grounds to anticipate an answer confirming the implied fact or is prepared to prove the fact by other means.' [Citation.]" (*People v. Earp* (1999) 20 Cal.4th 826, 859-860.) The prosecutor's questioning of appellant did not constitute misconduct. He did not try to give the jury the false impression that Bruneau had never used profanities in her communications with appellant. The prosecutor's questions implied that, after the January 2004 Belle Chasse incident, with one exception Bruneau had not used profanities because she was afraid of appellant. The one exception, the prosecutor said, was "when [appellant was] threatening her child." The prosecutor had reasonable grounds to believe that this implied fact was true. At the first trial, Bruneau testified: "As things unfolded, as I got beat up in January [2004 in Belle Chasse], as I became more afraid of [appellant] and knew his potential, I kept my behavior in check . . . I didn't want to inflame or aggravate him because I was

afraid of him." As we have already noted, at the preliminary hearing Bruneau testified that in December 2004 she had threatened to "fuckin' slit [appellant] like a pig" after he had threatened to harm her son.

The prosecutor never suggested that Bruneau had not made this threat. (3RT 659) Appellant testified during recross-examination that Bruneau had made the threat in a voice mail on December 18, 2004. The prosecutor responded, "She also in that voice mail indicated if you're going after her son Josh she will do that?" The prosecutor's response implied that Bruneau had threatened to "slit [appellant] like a pig" because appellant had threatened to harm her son.

The prosecutor did not try to mislead the jury by asking appellant to look through a stack of emails for examples of Bruneau's alleged threats and profanities. Bruneau testified that these emails, marked as People's Exhibit No. 26, were sent "in the summer months of 2006," long after the January 2004 Belle Chasse assault and the December 2004 "slit you like a pig" threat. The court subsequently stated in the jury's presence that "Miss Bruneau has indicated these are all the e-mails between the parties for the summer of 2006." Appellant has not cited any evidence showing that People's Exhibit No. 26 omitted emails from the summer of 2006 containing Bruneau's threats or profanities.

Allegation that Prosecutor Improperly Injected Himself into the Case

During the prosecutor's cross-examination, appellant testified that he believed Bruneau had "changed and altered text messages" that he had sent her. The prosecutor then asked: "Now, do you believe that I've altered text messages?" Defense counsel made a "[r]elevance" objection that was overruled. Appellant responded, "I don't believe you altered text messages." The prosecutor further inquired: "[D]o you believe that this is a frivolous case manufactured and fabricated by two conspiring deputy district attorneys?" Defense counsel made another "[r]elevance" objection that was overruled, and appellant answered, "Yes." The prosecutor asked if he was one of the conspiring deputy district attorneys. Appellant again answered, "Yes." The colloquy between the prosecutor and appellant continued as follows:

"Q [The Prosecutor] . . . I understand the English meaning of these words. 'Fabrication' to me meanings [*sic*] lying. 'Manufacturing' means making something up, right? Is that how you understand those words?

"A [Appellant] Yes.

"Q So is there a certain way that you believe either of these attorneys . . . has lied or are making stuff up?

"A Your witness [Bruneau] was lying.

"Q So that's why you believe that we're –

"A I think it's manufactured through a lying witness, yes.

"Q And do the attorneys have anything to do with that?

"[Defense Counsel] Your honor, where's the relevance of any of this?

"THE COURT: Overruled.

"[Appellant]: I guess I could say yes.

"Q [The Prosecutor]: How so, Mr. Gooch?

"A That's my perception, my belief.

"Q You don't believe these two individuals you're speaking of are just doing their job?

"A No."

Appellant contends that, by this line of questioning, the "prosecutor improperly injected himself into the case." Appellant asserts: "[T]he misconduct made appellant seem like a crazed conspiracy theorist who would unjustly accuse two ethical public servants of manufacturing and fabricating evidence."

The People contend that appellant forfeited the misconduct issue because defense counsel objected on relevance instead of misconduct grounds and did not request a curative admonition. " 'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion - and on the same ground - the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 820.) In the absence of a timely objection and request for an admonition, "the point

is reviewable only if an admonition would not have cured the harm caused by the misconduct.' [Citations.]" (*People v. Earp* (1999) 20 Cal.4th 826, 858.) Here any harm would have been cured by an admonition and the contention is forfeited.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

Denise de Bellefeuille, Judge
Superior Court County of Santa Barbara

Susan Lascher, under appointment by the Court of Appeal, for Defendant and Appellant.

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